

ORIGINAL

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

Petition of)
Lincoln County, Oregon, and the)
Economic Development Alliance of)
Lincoln County, a non-profit corporation,)
for Declaratory Ruling and Preemption)
Pursuant to Section 253 of the)
Communications Act of 1934)
of Certain Provisions of the Oregon)
Telecommunications Utility Law)

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COMMENTS OF
LINCOLN COUNTY
AND THE ECONOMIC
DEVELOPMENT
ALLIANCE

I. INTRODUCTION

The Oregon Public Utility Commission (the Oregon PUC) has rendered a decision which interprets Oregon law to require state licensing of the owner of the dark fiber component of a telecommunications network. This decision creates unnecessary burdens and impediments upon those attempting to enter and compete in the intrastate and interstate telecommunications markets. Therefore, the Federal Communications Commission (the Commission) should preempt this application of Oregon law because it impermissibly creates an entry barrier in violation of Section 253 of the Communications Act, and because it impermissibly intrudes upon FCC jurisdiction over interstate telecommunications.

II. FACTUAL BACKGROUND

A. The Excess Dark Fiber

The Central Lincoln People's Utility District (the PUD) is a municipal retail electric company operating along the central Oregon coast. In order to facilitate its own

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1 communication needs, the PUD installed a fiber optic¹ and microwave communications
2 network. Because of the economies of scale involved with installation of fiber optic lines,
3 the PUD's network has large amounts of capacity beyond what is actually needed by the
4 PUD for its own communications. As a result, the PUD graciously shares that excess
5 capacity with other governmental entities, such as Lincoln County (the County), the Lincoln
6 County School District, and the Lincoln County Library District, who currently use the dark
7 fiber, in conjunction with their own switches, for their own communication needs, and for
8 access to the Internet.

9 **B. The CoastNet Project**

10 The Lincoln County Board of Commissioners has adopted an economic development
11 plan designed to encourage economic development along the central Oregon coast. A
12 primary feature of that plan calls for the development of a high-speed communications
13 network.

14 The Economic Development Alliance of Lincoln County (the Alliance) is a not-for-
15 profit Oregon corporation existing for the purpose of promoting economic development and
16 employment opportunities in Lincoln County.

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¹ "In the 1970s scientists explored the possibility of transmitting information by sending light waves in the form of concentrated laser beam through glass fibers. This method of communication proved far superior to the conventional forms of transmission of information via copper, coaxial cable, and microwave." *Southwestern Bell Telephone Co v FCC*, 19F3d 1475, 1478 (DC Cir 1994). "The provision of the fiber optic lines without the necessary electronic equipment to power the fiber is commonly known as 'dark' fiber," as compared with 'lit' fiber, which "includes the electronic and other equipment necessary to power or 'light' the glass fiber." *Id.*

1 The Alliance became aware of the PUD's excess dark fiber capacity, and realized
2 that use of that excess capacity could provide significant and dramatic opportunities for
3 economic development and employment in Lincoln County. For that reason, the Alliance
4 and 38 other public and not-for-profit entities began a project known as CoastNet. After
5 much discussion and analysis, the CoastNet group created a three-step plan: (1) The County
6 leases a portion of the PUD's excess dark fiber capacity through an intergovernmental
7 agreement; (2) the Alliance purchases and installs switches and electronics necessary to
8 enable the excess capacity to operate as a functioning high-speed communications network;
9 and (3) the County and the Alliance enter into a CoastNet contract to combine the excess
10 dark fiber capacity and the switches into a functioning network, and make that network
11 available for the purpose of facilitating growth in economic development and employment
12 opportunities in Lincoln County (which may include direct offerings to members of the
13 public, or offerings to specific state licensed resellers of telecommunications services to the
14 public).

15 As for the first step, the PUD again graciously agreed to lease a portion of its excess
16 dark fiber capacity to the County for CoastNet through an intergovernmental agreement.

17 As for the second step, the Alliance was able to secure economic development grant
18 funds in the amount of \$305,000.00 for the CoastNet project switches and associated
19 electronics.

20 The third step has become the impediment to this important community development
21 project.

22 Because of mutual concerns about the possibility that the Oregon PUC might claim
23 some regulatory jurisdiction over CoastNet, staff from the County and the Alliance met with
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1 staff from the Oregon PUC. At that meeting, staff from the County and the Alliance
2 expressed the opinion that CoastNet would not be “telecommunications service” as defined
3 in Oregon law, and thus the Oregon PUC has no regulatory authority over CoastNet.
4 Oregon PUC staff disagreed with that interpretation of Oregon law. Therefore, rather than
5 ignore Oregon PUC staff (and also in the interest of intergovernmental cooperation), the
6 County and the Alliance chose to file applications with the Oregon PUC for a ruling that
7 CoastNet does not require a Certificate of Authority to Provide Telecommunications Service
8 (CoA) or, in the alternative, an order granting the County and the Alliance CoA’s to operate
9 CoastNet.

10 **C. State Law**

11 Oregon telecommunications law prohibits the offering of “telecommunications
12 service” on a “for hire” basis without a CoA from the Oregon PUC.² Oregon law defines
13 “telecommunications service” as “two-way switched access and transport of voice
14 communications.”³

15 **D. State Decision**

16 On September 18, 1997, OPUC issued a decision which determined that CoastNet
17 was “telecommunications service” as defined by Oregon law, thus requiring a CoA.

18 The decision also denied the requests of the County and the Alliance for CoA’s
19 because the PUD, the owner of the dark fiber component of CoastNet to be leased to the
20 County, had not also applied for a CoA. Citing earlier cases in which the Oregon PUC had

² Oregon Revised Statute § 759.020(1) (1995).

³ Oregon Revised Statute § 759.005(2)(g) (1995).

1 held that the provision of lit fiber (high-speed dedicated point-to-point services) was the
2 provision of “telecommunications service” as defined by Oregon law, OPUC held in this
3 case that even the provision by the PUD of the dark fiber component by itself (which is not
4 independently capable of transmitting any communications without appropriate electronics)
5 was the provision of “telecommunications service” on a “for hire” basis as defined by
6 Oregon law.⁴

7 This broad interpretation of Oregon law flies in the face of the plain language
8 contained in Oregon law, and is the subject of a pending state court appeal.⁵

9 This broad interpretation of Oregon law also generally imposes an unnecessary
10 burden upon providers of telecommunications service. The Oregon PUC would subject to
11 regulation each owner of each component part of a telecommunications network. In the case
12 of CoastNet, this unnecessary burden amounts to an effective entry barrier, because the PUD
13 has graciously permitted the County and the Alliance to use its excess dark fiber capacity,
14 but has no desire or intention to apply to the Oregon PUC for a CoA.⁶

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⁴ Essentially, the Oregon PUC concluded that a network element is, by itself, telecommunications service. Compare 47 USC § 153(29), which defines a “network element” as “a facility or equipment *used in the provision* of a telecommunications service (emphasis added),” and not telecommunications service itself.

⁵ *Lincoln County and Economic Development Alliance v Oregon PUC*, Marion County Circuit Court case # 97C-14075 (Or Circ Ct 1997).

⁶ Apparently, this is so for policy reasons internal to the PUD, and also because there is some question as to whether the PUD has the legal power to engage in telecommunications service. The PUD has not participated as a party to this or any of the state PUC proceedings, and has expressed no interest in doing so. As of this time, the PUD continues to be willing to lease a portion of its excess dark fiber capacity to the County for CoastNet, and the County is grateful for the PUD’s continuing patience.

1 **III. PREEMPTION**

2 **A. Impermissible Entry Barrier**

3 The Oregon PUC ruling described above constitutes a barrier to entry in violation of
4 Section 253 of the Communications Act of 1934.⁷

5 Section 253 was enacted by Congress as part of the Telecommunications Act of
6 1996, which was “a pro-competitive, de-regulatory national policy framework designed to
7 accelerate rapidly private sector deployment of advanced telecommunications and
8 information technologies and services to all Americans by opening all markets to
9 competition.”⁸ In so doing, Congress “rejected the historic paradigm of telecommunications
10 services provided by government-sanctioned monopolies in favor of a new paradigm that
11 encourages the entry of efficient competing service providers into all telecommunications
12 markets.”⁹ Among other things, the 1996 Act “arms new entrants into previously closed
13 telecommunications markets as well as this Commission and state regulators with powerful
14 tools to dismantle the legal, operational and economic barriers that frustrated competitive
15 entry in the past.”¹⁰

16 Section 253(a) provides that “[n]o State or local statute or regulation, or other State
17 or local legal requirement, may prohibit or have the effect of prohibiting the ability of any

⁷ 47 USC § 253.

⁸ Senate Conf Rep No 104-230, 104th Cong, 2d Sess 1 (1996).

⁹ *In re Petition for Preemption of Texas Telecommunication Law*, CCB Pol 96-13, 96-14, 96-16, and 96-19, FCC Order 97-346 (9/26/97), at ¶ 1.

¹⁰ *Id.*, at ¶ 2.

1 entity to provide any interstate or intrastate telecommunications service.”¹¹ Section 253(b)
2 permits a state to impose “requirements necessary to preserve and advance universal service,
3 protect the public safety and welfare, ensure the continued quality of telecommunications
4 services, and safeguard the rights of consumers,” provided that such requirements are
5 imposed “on a competitively neutral basis and consistent with section 254.”¹² Section
6 253(d) requires the Commission to preempt, to the extent necessary, the enforcement of “any
7 statute, regulation, or legal requirement that violates subsection (a) or (b).”¹³

8 The Commission has already had a number of occasions to interpret and apply
9 Section 253.¹⁴ In a recent case from Texas, the Commission noted that Section 253
10 “expressly empowers -- indeed, obligates -- the Commission to remove any state or local
11 legal mandate that ‘prohibit[s] or has the effect of prohibiting’ a firm from providing any
12 interstate or intrastate telecommunications service.”¹⁵ The Commission held that “that this
13 provision commands us to sweep away not only those state or local requirements that
14 explicitly and directly bar an entity from providing any telecommunications service, but also

¹¹ 47 U.S.C. § 253(a).

¹² 47 U.S.C. § 253(b).

¹³ 47 U.S.C. § 253(d).

¹⁴ See, e.g., *In re Petition for Preemption of Texas Telecommunication Law*, CCB Pol 96-13, 96-14, 96-16, and 96-19, FCC Order 97-346 (9/26/97); *In re Petition for Preemption of Wyoming Telecommunications Law*, CCB Pol 97-1, FCC Order 97-336 (9/23/97); *In re Petition for Preemption of Huntington Park Ordinance*, CCB Pol 96-26, FCC Order 97-251 (7/16/97); and *In re Petition for Preemption of Connecticut Telecommunications Law*, CCB Pol 96-11, FCC Order 96-470 (12/6/96).

¹⁵ *In re Petition for Preemption of Texas Telecommunication Law*, CCB Pol 96-13, 96-14, 96-16, and 96-19, FCC Order 97-346 (9/26/97), at ¶ 22.

1 those state or local requirements that have the practical effect of prohibiting an entity from
2 providing service.”¹⁶

3 In the recent *Texas* decision, the Commission applauded the actions of the Texas
4 PUC in their attempts to interpret Texas law in a manner that would be consistent with the
5 1996 Telecommunications Act.¹⁷ The Commission specifically encouraged “other state
6 regulatory commissions to interpret their enabling statutes, so far as possible, in a manner
7 that is consistent with the national pro-competitive, deregulatory policy framework for
8 telecommunications services.”¹⁸

9 In this case, the Oregon PUC has done exactly the opposite. Whereas the Texas PUC
10 went through great strains to interpret arguably facially conflicting state law in a manner that
11 would be consistent with the Telecommunications Act of 1996 (and thus avoided the
12 necessity for the Commission to preempt many portions of Texas telecommunications
13 law),¹⁹ the Oregon PUC has gone through great strains to interpret arguably non-conflicting
14 state law in a manner that is inconsistent with the Telecommunications Act of 1996.

15 The County and the Alliance attempted to let the Oregon PUC know that an
16 interpretation of Oregon law in the manner urged by Oregon PUC staff would likely violate
17 the Telecommunications Act of 1996. In the *Texas* case, the Commission held that “no state
18 or local requirement may prohibit or have the effect of prohibiting any entity from providing

¹⁶ *Id.*, at ¶ 22.

¹⁷ *Id.*, at ¶ 7.

¹⁸ *Id.*, at footnote 18.

¹⁹ *Id.*

1 any offering of telecommunications directly to the public for a fee regardless of the facilities
2 used.”²⁰

3 With very little analysis, the Oregon PUC merely concluded that their interpretation
4 of Oregon law is permitted by the “broad exceptions” to Section 253(a) as contained in
5 Section 253(b).²¹ Thus, the Oregon PUC seemingly concedes that their interpretation of
6 Oregon law is in conflict with Section 253(a),²² but is saved by Section 253(b).

7 The Oregon PUC’s reliance upon Section 253(b) is misplaced. “Section 253(b)
8 preserves a State’s authority to impose a legal requirement affecting the provision of
9 telecommunications services, but only if the legal requirement is: (i) ‘competitively
10 neutral’; (ii) consistent with the Act’s universal service provisions; and (iii) ‘necessary’ to
11 accomplish certain enumerated public interest goals.”²³ Preemption is required under
12 Section 253(a) unless the asserted Section 253(b) exception meets “all three of the criteria
13 set forth in section 253(b).”²⁴

14 Like the Texas PUC, the Oregon PUC has parroted Section 253(b) and baldly
15 asserted that application of the state licensing requirement to each network element is

²⁰ *Id.*, at ¶ 74.

²¹ Oregon PUC Order # CP 120, CP 191, CP 215 (attached to the Petition as Exhibit “1”), at page 7.

²² Under Section 253, the Commission “first determine[s] whether the challenged law, regulation or legal requirement violates the terms of section 253(a) standing alone. If we find that it violates section 253(a) considered in isolation, we then determine whether the requirement nevertheless is permissible under section 253(b).” *In re Petition for Preemption of Texas Telecommunication Law*, CCB Pol 96-13, 96-14, 96-16, and 96-19, FCC Order 97-346 (9/26/97), at ¶ 42.

²³ *In re Petition for Preemption of Wyoming Telecommunications Law*, CCB Pol 97-1, FCC Order 97-336 (9/23/97), at ¶ 40.

²⁴ *Id.* “Permissible state or local requirements under section 253(b) also must be ‘necessary’ to achieve the public interest purposes listed in that section.” *In re Petition for Preemption of Texas Telecommunication Law*, CCB Pol 96-13, 96-14, 96-16, and 96-19, FCC Order 97-346 (9/26/97), at ¶ 83.

1 necessary to preserve and advance universal service, protect the public welfare, ensure the
2 continued quality of telecommunications services, and safeguard consumer rights.²⁵
3 However, also like the Texas PUC, the Oregon PUC has utterly failed to demonstrate that its
4 interpretation acts to further any one of the goals set forth in Section 253(b), or is necessary²⁶
5 to achieve any of those goals. The County is at a loss to explain how the Oregon PUC
6 interpretation meets or advances any of those goals.

7 The Oregon PUC has interpreted Oregon telecommunications law to require state
8 licensing of each telecommunications network element as a telecommunications service.
9 The practical effect of that interpretation creates a result that is inconsistent with Section
10 253(a). Furthermore, that interpretation is not necessary to further any of the permissible
11 goals provided in Section 253(b). Therefore, the Commission should preempt Oregon law
12 to the extent necessary to eliminate the state imposed requirement that each
13 telecommunications network element be licensed by the state.

14 **B. Impermissible Intrusion into FCC Jurisdiction**

15 The Oregon PUC ruling described above also constitutes an impermissible intrusion
16 into FCC jurisdiction over interstate telecommunications.

²⁵ Oregon PUC Order # CP 120, CP 191, CP 215 (attached to the Petition as Exhibit "1"), at page 7.

²⁶ The Commission has already held that Congress did not intend that the term "necessary" be interpreted "in a manner that could enable the exception contained in subsection 253(b) to swallow the general rule prohibiting barriers to entry in subsection 253(a)," and that the goal in interpreting the term "necessary" is to "foster the overall pro-competitive, de-regulatory framework that Congress sought to establish through the 1996 Act and the directive in section 253 to remove barriers to entry." *In re Petition for Preemption of Connecticut Telecommunications Law*, CCB Pol 96-11, FCC Order 96-470 (12/6/96), at ¶ 25.

1 In addition to the specific power of preemption granted to the FCC by Section 253,
2 the FCC also has authority to preempt state law when state law “stands as an obstacle to the
3 accomplishment and execution of the full purposes and objectives of Congress.”²⁷

4 A major feature of the proposed CoastNet system will be its ability to interconnect
5 with the Internet for purposes of information resources, and audio and video
6 telecommunications. Because the Internet is an interstate and international network, it is
7 likely that a large percentage of the traffic carried on the proposed CoastNet system will be
8 interstate in nature. Therefore, even though CoastNet facilities would be intrastate, its use
9 and application would largely be interstate, and is therefore jurisdictionally interstate as part
10 of a larger network of telecommunications.²⁸ Thus, the Oregon PUC’s assertion of
11 jurisdiction over that system, and action in prohibiting its use without Oregon PUC
12 certification of all network elements, impermissibly intrudes on the FCC’s jurisdiction over
13 interstate telecommunications.

14 Even well prior to the 1996 Telecommunications Act, the Commission held that a
15 state restriction which effectively prevents interstate telecommunications over a fiber optic
16 network is subject to being preempted by the Commission.²⁹ As in that case, the interstate
17 communications provided by CoastNet will be inseparable from intrastate communications
18 for regulatory purposes.

²⁷ *Fidelity Federal Savings and Loan v De La Cuesta*, 458 US 141, 153 (1982); accord, *Louisiana Public Services Commission v FCC*, 476 U.S. at 370; see also *In re Petition for Preemption of Texas Telecommunication Law*, CCB Pol 96-13, 96-14, 96-16, and 96-19, FCC Order 97-346 (9/26/97), at ¶ 46.

²⁸ See *Texas PUC v FCC*, 886 F2d 1325 (DC Cir 1989) (affirming FCC preemption of a Texas PUC attempt to prevent connection of an intrastate telecommunications system to an FCC regulated interstate system).

²⁹ *In re Norlight*, 2 FCC Rcd 132, recon den 2 FCC Rcd 5167 (1987), *app diss sub nom Public Service Commission of Wisconsin v FCC*, 87-1618 (DC Cir 1989).

The Oregon PUC has interpreted Oregon telecommunications law to require state licensing of the dark fiber component of a telecommunications network designed to provide a combination of intrastate and interstate telecommunications services. The practical effect of that interpretation prevents CoastNet. Therefore, the Commission should preempt the Oregon PUC's assertion of regulatory jurisdiction over the CoastNet system.

III. CONCLUSION

The Oregon PUC has issued a decision which effectively precludes CoastNet. That decision is inconsistent with Section 253 of the Communications Act, and it also impermissibly interferes with FCC jurisdiction over interstate telecommunications. Therefore, the Commission should preempt that decision, or at least preempt the portion of the decision that requires state licensing of the dark fiber component of a telecommunications network.

DATED this 6th day of January, 1998.

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CERTIFICATE OF MAILING AND SERVICE

CERTIFICATE OF MAILING

I hereby certify that on January 6, 1998, I mailed the original and twelve copies of the foregoing COMMENTS OF LINCOLN COUNTY AND THE ECONOMIC DEVELOPMENT ALLIANCE to the Federal Communications Commission by placing that original and those copies in a sealed envelope addressed as follows:

Secretary, FCC
1919 M Street, NW
Washington, DC 20554

CERTIFICATE OF SERVICE

I also certify that on January 6, 1998, I mailed a copy of the foregoing COMMENTS OF LINCOLN COUNTY AND THE ECONOMIC DEVELOPMENT ALLIANCE to:

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